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Department of Water Resources  
Eastern Region

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BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO

IN THE MATTER OF PERMIT TO  
APPROPRIATE WATER NO. 74-16187  
IN THE NAME OF KURT W. BIRD and  
JANET E. BIRD

**APPLICANT'S RESPONSE TO JOINT  
MOTION BY IWRB AND IDFG FOR  
PARTIAL SUMMARY JUDGMENT**

Applicants Kurt W. Bird and Janet E. Bird, (hereinafter collectively "Bird" or the "Applicant"), by and through their attorneys of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby file this response to the *Joint Motion By IWRB And IDFG For Partial Summary Judgment* (the "Motion") filed by two of the protestants in the above-entitled matter on July 30, 2019.

IDAPA 37.01.01 "contains the rules of procedure that govern the contested case proceedings before the Department of Water Resources and Water Resource Board of the state of Idaho." Rule 001.02.<sup>1</sup> Application for Permit No. 74-16187 (hereinafter simply "74-16187") is a contested case before the Idaho Department of Water Resources' ("IDWR" or "Department").

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<sup>1</sup> Citations to rules in IDAPA 37.01.01 hereafter only include the specific subsections for these rules and do not include IDAPA 37.01.01 before the subsection citation.

Rule 565 allows parties to a contested case fourteen (14) days to respond to a motion. This response to the Motion has been filed within this timeframe.

## **I. ARGUMENT**

### **A. The Motion must be denied.**

The self-stated purpose of the Motion is a “narrow motion” which “seeks only to affirm certain important legal conclusions regarding the ‘local public interest’ reached in the Department’s proceedings on [Water Right No.] 74-15613 (the ‘Whittaker case’) will continue to apply in this case.” Motion at 6. These selective legal conclusions are:

- (1) That it is in the “local public interest,” Idaho Code § 42-203A(5), to maintain the anadromous fisheries in Big Timber Creek and in the Lemhi River drainage (*Order Denying Reconsideration* at 2);
- (2) That efforts by local people, organizations, and governmental agencies to “reconnect” Big Timber Creek to the Lemhi River, and other local efforts to recover fish species listed under the Endangered Species Act (“ESA”), contribute to the development of a cooperative conservation agreement intended to promote conservation of the listed species and to provide local people with protection from incidental “take” liability under the ESA (*Final Whittaker Order* at 8);
- (3) That it is not in the “local public interest,” Idaho Code § 42-203A(5), to approve a new appropriation that will result in further dewatering of Big Timber Creek or would frustrate efforts to “reconnect” Big Timber Creek to the Lemhi River (*Final Whittaker Order* at 8); and
- (4) the principle of conservation of the water resources within the State of Idaho, Idaho Code § 42-203A(5), requires that portions of the unappropriated water in streams supporting anadromous fish should remain in the streams for the protection of fish habitat and the public interest (*Final Whittaker Order* at 8; *Order Denying Reconsideration* at 2).

Motion at 9. According to the IWRB and IDFG, “[a]ffirming these legal principles will help narrow the issues for hearing and will avoid the potential for inconsistent legal interpretations of the ‘local public interest.’” *Id.*

Based on the express language of what the Motion seeks and is based upon, it must be denied. This is because the findings and conclusions for which the IWRB and IDFG seek reaffirmation are selective and ignore other findings, conclusions, and the ultimate decision on 74-15613 to include the imposition of the following conditions on the permit issued for 74-15613:

7. Prior to the diversion and use of water under this approval, the right holder shall comply with all fish screening and/or fish passage requirements of the Idaho Department of Fish and Game.
8. At any time the flow rate in Big Timber Creek is greater than 13 cfs at all locations from the confluence of Little Timber Creek and Big Timber Creek down to the confluence of Big Timber Creek and the Lemhi River, the right holder may divert water under this right at a flow rate equal to the difference between the measured flow and 13 cfs, but not exceeding the flow rate authorized by this right.
9. The right holder shall cease diverting water under this right if the flow of Big Timber Creek is 13 cfs or less at any location between the point of diversion and the confluence of Big Timber Creek and the Lemhi River.
10. To determine whether water can be diverted under this right, the right holder and/or the watermaster shall measure the flows in Big Timber Creek at an existing measuring station near the Townsite of Leadore, located in the NENWNW, Section 31, T16N, R22E. The Department retains jurisdiction to require the right holder to install and maintain additional measuring sites to insure required bypass flows are maintained during diversions under this right.

It was made very clear at the prehearing conference on the above-entitled matter that Bird has already stipulated to inclusion of these exact same conditions on a permit issued for 74-16187. Stated another way, Bird has no intention of attacking or challenging the imposition of these same conditions or in any way seeking more favorable conditions that would place 74-16187 in a better position than Whittaker’s more senior water right (74-15613). Similarly, Bird has no intention of challenging the fish-based local public interest basis of the imposition of these conditions because there is well-established history of the “local public interest” including fish and wildlife considerations.

Idaho Code § 42-202B currently defines the local public interest as “the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.” In 1978, the local public interest review requirement was added by the Idaho Legislature to the statutory review criteria of the Director required for approval of appropriations of new water rights. 1978 Idaho Sess. Laws, ch. 306, § 1 (codified as amended at Idaho Code §§ 42-203B(3), 42-203A(5)(e)). As originally enacted, the provision stated:

[W]here the proposed use is such . . . that it will conflict with the local public interest, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use, . . . the director of the department may reject such application . . . .

1978 Idaho Sess. Laws, ch. 306, § 1 (codified as amended at Idaho Code §§ 42-203B(3), 42-203A(5)(e)). Under this original language, the Idaho Supreme Court held in *Shokal v. Dunn*, 109 Idaho 330, 339, 707 P.2d 441, 450 (1985), that the legislature “must have included the public interest on the local scale to include the public interest elements listed in section 42-501[.]” which included “**fish and wildlife habitat, aquatic life**, recreation, aesthetic beauty, transportation and navigation values, and water quality.” *Id.* at 337, 707 P.2d at 448 (emphasis added). Eventually, the initial broader local public interest definition was narrowed to eliminate consideration of “secondary matters” on issues already subject to the oversight of other governmental entities. But the legislation to narrow the definition made it clear that such narrowing did not exempt fish and wildlife and aquatic life considerations:

Water Resources’ role under the “local public interest” is to ensure that proposed water uses are consistent with securing “the greatest possible benefit from [the public waters] for the public.” Thus, within the confines of this legislation, Water Resources should consider all locally important factors affecting the public water resources, **including but not limited to fish and wildlife habitat, aquatic life**, recreation, aesthetic beauty, transportation, navigation, water quality and the effect of such use on the availability of water for alternative uses of water that might be made within a reasonable time. This legislation contemplates that “[t]he relevant

impacts and their relative weights will vary with local needs, circumstances, and interests.” The determination of what elements of the public interest are impacted, and what the public interest requires, is committed to Water Resources’ sound discretion.”

In recent years, some transactions have been delayed by protests based on a broad range of social, economic and environmental policy issues having nothing to do with the impact of the proposed action on the public’s water resource. Applicants have experienced costly delays and have been required to hire experts to respond to issues at an agency whose propose has nothing to do with those issues.

This legislation also clarifies that the effect on the local economy of a watershed or local area that is the source of a proposed use of water but not the place of use for the proposed use shall be considered. The purpose of this criteria is to ensure that out of basin transfers do not deprive a local area of use of the available water supply.

Statement of Purpose, H.B. 284 (2003) (emphasis added). Accordingly, while the full list of which matters are worthy of consideration under this criterion has not yet been completed, there is no dispute that the list already includes fish and wildlife and aquatic life considerations.

Because the local public interest encompasses many things, in a contested case before the Department, it is typical that there will be competing local public interest issues that a hearing officer must weigh and consider, and is wrestling with those issues, the hearing officer often includes conditions on the water right permit intended to address or balance the competing local public interest concerns. That is precisely what Director Spackman did in the Final Order for Whittaker’s 74-15613. After he wrestled with the local public interest benefit of irrigation with the local public interest benefits of fish, wildlife, and aquatic life, he imposed the 13 cfs minimum bypass flow conditions in the permit for 74-15613. He did so based on the following analysis:

4. Irrigation is a beneficial use of water, and is a traditional use of water that gives rise to a presumption of public interest. The benefits that can be derived from

diversion of water and irrigation as proposed by Whittakers, even for a short period of time, are real and substantial.

5. On the other hand, there is a possibility that Whittakers could further dewater Big Timber Creek while diverting water for irrigation. The purpose of the reconnection effort is to reestablish continuous flows from Big Timber Creek into the Lemhi River.

6. Reconnection of Big Timber Creek and the Lemhi River has been promoted through significant efforts of the local people and government agencies as one of the solutions for salmon, steelhead, and bull trout recovery. The stream reconnection and other salmon, steelhead, and trout recovery efforts by the local people contribute to the development of a cooperative conservation agreement pursuant to Section 6 of the Endangered Species Act. The plan is intended to promote conservation of species listed under the Endangered Species Act and to provide protection from incidental take liability. It is not in the local public interest to allow a new appropriation that will result in further dewatering of Big Timber Creek that would frustrate the reconnection efforts.

7. It is in the public interest, however, to allow Whittakers to divert water during high flow periods when sufficient water is flowing in Big Timber Creek to satisfy the passage requirement of adult anadromous fish.

8. Furthermore, in considering the conservation of the waters of the state of Idaho, portions of unappropriated water in streams supporting anadromous fish should remain in the stream for the protection of the fish habitat.

Final Order (74-15613) at 7-8.

The Motion only selectively includes some of the above conclusions, and not others. This appears to be intentional because there is nothing in the plain language of the Motion about the 13 cfs bypass conditions and how it is in the public interest to allow an irrigator (such as Bird) to divert water at high flow periods, but only when there is enough flow in Big Timber Creek to satisfy adult anadromous fish passage. The legal conclusions for which the IWRB and IDFG seek summary judgment on only tell half of the story of how the decision on 74-15613 was reached, and yet, these legal conclusions formed the basis for why the 13 cfs bypass conditions were imposed on 74-15613.

For this reason, the IWRB and IDFG appear to seek a pre-trial determination that the hearing officer should find that Bird's irrigation is not in the local public interest and that only the

fisheries-based public interest matters specified in the Motion are in the local public interest in this contested case. Stated another way, because the local public interest already includes fish and wildlife considerations (even under the narrower definition), it would make no sense for the IWRB and IDFG to file a motion for partial summary judgment to simply reaffirm prior precedent that is undisputed. This suggests that there is more to the Motion and seeking a determination on only selected portions of the Final Order for 74-15613, and not the portions that acknowledge Whittaker's irrigation as a public interest action, should be denied.

When considering a motion for summary judgment, "[t]he court must grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Idaho Rule of Civil Procedure 56(a). In considering a summary judgment motion:

The burden of establishing the absence of a genuine issue of material fact rests at all times with the party moving for summary judgment. [The] Court liberally construes the record in the light most favorable to the party opposing the motion, drawing all reasonable inferences and conclusions in that party's favor. If there is no genuine issue of material fact, only a question of law remains.

*Davison v. Debest Plumbing, Inc.*, 163 Idaho 571, 574–75, 416 P.3d 943, 946–47 (2018) (citations and internal quotation marks omitted). Accordingly, the nonmoving party is entitled to all contested facts and every reasonable inference in their favor.

There is simply no question that irrigation is in the local public interest. As described in the Final Order for 74-15613, "[i]rrigation is a beneficial use of water, and is a traditional use of water that **gives rise to a presumption of public interest. The benefits that can be derived from diversion of water and irrigation as proposed by Whittakers, even for a short period of time, are real and substantial.**" Final Order (74-15613) at 7-8. And yet, even if the public interest nature of irrigation is debatable, at the summary judgment stage, all facts and reasonable

inferences are to be made in Bird's favor to at least allow Bird to present evidence at the hearing on the beneficial nature of irrigation on the proposed place of use. Accordingly, based on the foregoing, the Motion must be denied.

**B. In the alternative to denying the Motion, Bird will stipulate to the inclusion of all local public interest principles from the proceedings on Whittaker's 74-15613.**

As stated above, it was made very clear at the prehearing conference on the above-entitled matter that Bird has already stipulated to inclusion of the exact same 13 cfs minimum bypass flow permit conditions for 74-16187. Bird's stipulation on these bypass flow conditions demonstrates that Bird has no intention of challenging the fish-based local public interest basis of the imposition of these conditions.

The failure to include findings and conclusions relating to the public interest benefits of irrigation and associated 13 cfs bypass flow conditions is missing from the Motion. Furthermore, some of the proposed language is inconsistent with what was stated in the Final Order for Whittaker's 74-15613. If the IWRB and IDFG are willing to include additional and amended language (shown below in bold and strikethrough) likewise included in the Final Order for 74-15613, then Bird will stipulate to (and not challenge at the hearing) these findings and conclusions for purposes of the contested case on Bird's 74-16187:

- (1) That it is in the "local public interest," Idaho Code § 42-203A(5), to maintain the anadromous fisheries in Big Timber Creek and in the Lemhi River drainage (*Order Denying Reconsideration* at 2);
- (2) That efforts by local people, organizations, and governmental agencies to "reconnect" Big Timber Creek to the Lemhi River, and other local efforts to recover fish species listed under



the Endangered Species Act (“ESA”), contribute to the development of a cooperative conservation agreement intended to promote conservation of the listed species and to provide local people with protection from incidental “take” liability under the ESA (*Final Whittaker order* at 8);

(3) That it is not in the “local public interest,” Idaho Code § 42-203A(5), to approve a new appropriation that will result in further dewatering of Big Timber Creek or would frustrate efforts to “reconnect” Big Timber Creek to the Lemhi River (*Final Whittaker Order* at 8);

(4) **It is in the public interest, however, to allow Bird to divert water during high flow periods when sufficient water is flowing in Big Timber Creek to satisfy the passage requirement of adult anadromous fish, which is 13 cfs; and**

(5) the principle of conservation of the water resources within the State of Idaho, Idaho Code § 42-203A(5), **requires supports a finding** that portions of the unappropriated water in streams supporting anadromous fish should<sup>[2]</sup> remain in the streams for the protection of fish habitat and the public interest, **which in this matter is 13 cfs** (*Final Whittaker Order* at 8; *Order Denying Reconsideration* at 2).

Based on the foregoing, and in the alternative to denying the Motion, Bird will stipulate to these findings and conclusions provided that the IWRB and IDFG does not challenge the 13 cfs amount that was supported by the evidence presented in the Whittaker 74-15613 matter.

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<sup>2</sup> The mandatory term “requires” is inconsistent with the discretionary term of “should.” The Idaho Supreme Court has “repeatedly construed the word ‘shall’ as being mandatory, not discretionary.” *State v. Tribe*, 123 Idaho 721, 726, 852 P.2d 87, 92 (1993) (citations omitted); *Roesch v. Klemann*, 155 Idaho 175, 178, 307 P.3d 192, 195 (2013) (“This Court has held that the words ‘must’ and ‘shall,’ when used in a statute, indicate that the language is mandatory” (citations omitted)); *Twin Falls Cnty. v. Idaho Com’n on Redistricting*, 152 Idaho 346, 349, 271 P.3d 1202, 1205 (2012) (“That statute contains mandatory provisions and advisory provisions. The words ‘must’ and ‘shall’ are mandatory, and the word ‘should’ is not” (internal citations omitted)). For these reasons, the term “requires” should be amended as proposed.

It is unclear why the IWRB and IDFG did not want to include the bolded language set forth above, as this language is part and parcel to the final decision rendered on the Whittaker matter. To the extent it was not included because of perceived issues with the administration and reporting of the 13 cfs conditions associated with 74-15613—as appears to be the discrete purpose for the hiring of Terry Scanlan given the contents of his report—it is important to note that neither Bird nor Whittaker have legal responsibility for the measurement, accounting, and reporting of the diversions for 74-154613 and its associated 13 cfs minimum bypass flow conditions. Rather, it is the State of Idaho’s sole and exclusive responsibility to regulate those diversions, a responsibility which it cannot delegate to private persons or entities under Idaho law. This important principle deserves additional discussion.

Idaho Code § 42-602 provides:

The **director of the department of water resources shall** have direction and control of the distribution of water from **all natural water sources** within a water district to the canals, ditches, pumps and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director.

The **director of the department of water resources shall** distribute water in water districts in accordance with the prior appropriation doctrine. The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

The Idaho Supreme Court confirmed the Director’s governmental authority under this statute concerning matters of priority administration and water distribution in the case of *In re SRBA, Case No. 39576, Subcase 00-91017 (Basin-Wide Issue 17—Does Idaho Law Require a Remark Authorizing Storage Rights to ‘Refill’, Under Priority, Space Vacated for Flood Control)*, Nos. 40974 and 40975, 2014 WL 3810591 (Aug. 4, 2014) (hereinafter, simply “BW 17”):

The IDWR has a statutory duty to allocate water. The Idaho legislature gave the IDWR’s Director the power to make appropriation decisions in Idaho Code

section 42–602: “[t]he director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the ... facilities diverting therefrom.” The Director also “shall distribute water in water districts in accordance with the prior appropriation doctrine.” *Id.* This means that the Director cannot distribute water however he pleases at any time in any way; he must follow the law.

Idaho Code section 42–602 gives the Director broad powers to direct and control distribution of water from all natural water sources within water districts. *In re Idaho Dep't of Water Res. Amended Final Order Creating Water Dist. No. 170*, 148 Idaho 200, 211, 220 P.3d 318, 329 (2009). That statute gives the Director a “clear legal duty” to distribute water. *Musser v. Higginson*, 125 Idaho 392, 395, 871 P.2d 809, 812 (1994) (*abrogated on other grounds by Rincover v. State Dep't of Fin.*, 132 Idaho 547, 976 P.2d 473 (1999)). However, “the details of the performance of the duty are left to the director's discretion.” *Id.* Therefore, from the statute's plain language, as long as the Director distributes water in accordance with prior appropriation, he meets his clear legal duty. Details are left to the Director.

This Court has recognized the Director's discretion to direct and control the administration of water in accordance with the prior appropriation doctrine. In *Arkoosh v. Big Wood Canal Co.*, 48 Idaho 383, 283 P. 522 (1929), downstream natural flow water users sued to enjoin upstream users with junior storage water rights from interfering with the downstream users' rights. The downstream users claimed that they had the right to receive their decreed water whenever they chose and that the upstream users had to fulfill the downstream users' right from the stored water. *Arkoosh*, 48 Idaho at 388, 283 P. at 523. The original decree made the downstream users the judges of when they could use the water, which the Court noted was too broad in that “their right to receive water at any time they may demand it is a matter finally adjudicated.” *Id.* at 395, 283 P. at 525. At the time the Commissioner of Reclamation occupied a similar position to the current Director, and the Court noted that this was a matter that should be determined by the Commissioner's department. *Id.* at 395, 283 P. at 526. Similarly, this Court has stated that the Director “is charged with the duty of direction and control of distribution of the waters from the streams to the ditches and canals.” *DeRousse v. Higginson*, 95 Idaho 173, 179, 505 P.2d 321, 327 (1973). More recently, this Court further articulated the Director's discretion: “Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director.” *AFRD# 2*, 143 Idaho at 880, 154 P.3d at 451. Thus, the Director's clear duty to act means that the Director uses his information and discretion to provide each user the water it is decreed. And implicit in providing each user its decreed water would be determining when the decree is filled or satisfied.

BW 17 at \*7-\*8.

Concerning its mandated governmental function to distribute water, the Director has not been shy in reminding water users of his duty, responsibility, and authority. After referencing BW 17 in a recent September 10, 2014 *Order Lifting Stay and Notice of Status Conference* in an administrative matter concerning the distribution of water to the federal on-stream reservoirs in Water District 1,<sup>3</sup> Director Spackman, stated:

The decision affirms the Director's authority to determine how much water is counted or credited toward the fill of a water right. The Court expressly rejected the argument raised by the Surface Water Coalition and the Boise Project Board of Control that the Director lacked the statutory authority to determine when a water right is satisfied. The Court stated:

Idaho Code section 42-602 gives the Director broad powers to direct and control distribution of water from all natural water sources within water districts. That statute gives the Director a clear legal duty to distribute water. However, the details of the performance of the duty are left to the director's discretion. Therefore, from the statute's plain language, as long as the Director distributes water in accordance with prior appropriation, he meets his clear legal duty. Details are left to the Director.

*In re SRBA* at 7 (citations and quotations omitted).

The Court went on to discuss cases that recognize the Director's discretion to direct and control the administration of water, concluding:

Somewhere between the absolute right to use a decreed water right and an obligation not to waste it and to protect the public's interest in this valuable commodity, lies an area for the exercise of discretion by the Director. Thus, the Director's clear duty to act means that the Director uses his information and discretion to provide each user the water it is decreed. And implicit in providing each user its decreed water would be determining when the decree is filled or satisfied.

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<sup>3</sup> This document is found on IDWR's website at <https://idwr.idaho.gov/files/legal/WD01/WD01-20140910-Order-Lifting-Stay-and-Notice-of-Status-Conference.pdf>

*Id.* at 8 (citations and quotations omitted).

*Id.* at 1-2; See also *Final Order, In the Matter of Petition to Amend Rule 50*, at 5 (August 29, 2014) (Another order from Director Spackman quoting language from the BW 17 case after stating that “[t]he Idaho legislature has granted the Director broad discretion in implementing his administrative responsibilities.”)<sup>4</sup>

In BW 17, the Idaho Supreme Court affirmed the SRBA Court’s (Judge Eric Wildman’s) decision on this issue concerning the director’s authority over water distribution by priority. In his *Memorandum Decision*, Judge Wildman held:

Furthermore, the authority and responsibility for measuring and distributing water to and among appropriators is statutorily conferred to, and vested in, the Idaho Department of Water Resources and its Director. Idaho Code § 42-103 provides that “it shall be the duty of the department of water resources to devise a simple, uniform system for the measurement and distribution of water.” Chapter 6, Title 42 of the Idaho Code governs the “distribution of water among appropriators” and directs that the Director and the watermasters under his supervision are statutorily charged with distributing water to water rights. In particular, Idaho Code § 42-602 vests in the Director, the “direction and control of the distribution of water from all natural water sources with a water district to canals, ditches, pumps and other facilities diverted therefrom.” Similarly, Idaho Code § 42-603 instructs that the Director is “authorized to adopt rules and regulations for the distribution of water from the streams, rivers, lakes, ground water and other natural water sources as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof.”

The Director has the authority and discretion to determine how water from a natural water source is distributed to storage water rights pursuant to accounting methodologies he employs. The Director’s discretion in this respect is not unbridled, but rather is subject to state law and oversight by the courts. See *American Falls Reservoir Dist. No. 2*, 143 Idaho at 880, 154 P.3d at 451 (addressing court oversight on a properly developed record). When review of the Director’s discretion in this respect is brought before the courts in an appropriate proceeding, and upon a properly developed record, the courts can determine whether the Director has properly exercised his discretion regarding accounting methodologies.

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<sup>4</sup> A copy of this order is available on IDWR’s website at <https://idwr.idaho.gov/files/legal/CMR50/CMR50-20140829-Final-Order.pdf>

*Memorandum Decision, Basin Wide Issue 17, Subcase No. 00-91017*, at 11-12.<sup>5</sup> Judge Wildman also very clearly described the process for disputes over water distribution, and it is to review the Director's discretion regarding such distribution which is "brought before the courts in an appropriate proceeding, and upon a properly developed record, the courts can determine whether the Director has properly exercised his discretion . . ." *Id.* at 12.

Having established IDWR's sole and exclusive governmental authority to regulate diversions during priority administration, the Idaho Code also gives IDWR the tools necessary to accomplish that task. As described by Judge Wildman, Idaho Code § 42-603 allows the director to promulgate water distribution rules and Idaho Code § 42-604 allows the Director to create "water districts" staffed with state-employed watermasters and deputy watermasters. When this is done, "[e]ach water district created hereunder shall be considered an instrumentality of the state of Idaho for the **purpose of performing the essential governmental function of distribution of water among appropriators.**" Idaho Code § 42-604 (emphasis added).

A sister water district to Water District 74W (the water district that oversees water distribution on Big Timber Creek and Little Timber Creek) is Water District 1.<sup>6</sup> In 1991, the Idaho Attorney General's office was asked for an opinion regarding the nature of Water District 1. The resulting letter confirms the principles described herein relative to the Director's authority over water distribution. *Attorney General Opinion No. 91-7* (August 5, 1991)<sup>7</sup> (hereinafter, simply "Opinion 91-7"). The AG's office concluded:

The existence and operation of state water districts, such as Water District 1, are governed by the provisions of chapter 5, Title 42, Idaho Code, first enacted in 1903. Act of March 11, 1903, 1903 Idaho Sess. Laws 223. **State water districts are**

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<sup>5</sup> The decision is available on the SRBA Court's website at <http://164.165.134.61/S0091017XX.HTM>.

<sup>6</sup> Water District 1's website is [www.waterdistrict1.com](http://www.waterdistrict1.com). As described on the website, the current watermaster for Water District 1 is Lyle Swank.

<sup>7</sup> This document and is also available at <https://www.ag.idaho.gov/content/uploads/2018/04/OP91-07.pdf>

**instrumentalities of the state that exist for the purpose of assisting the IDWR in carrying out its duty under Idaho Code § 42-604 to provide for the distribution of the public waters of the state in accordance with rights of prior appropriation.**

“Water District 1 is an instrumentality of the state established by a predecessor of the Director (Director) of the Department of Water Resources, pursuant to Idaho Code § 42-604, **for the purpose of assisting the Department in carrying out its responsibility to distribute the public waters of the state in accordance with the rights of prior appropriation.**”

Opinion 91-7 at 3, 1 (emphasis added). Opinion 91-7 also discusses case law supporting the conclusion that, as water district watermasters, such individuals are governmental officers:

The Idaho Supreme Court has held that a watermaster is a public administrative officer who holds office until a successor is elected or appointed and qualified. *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 263 P. 45 (1927). A watermaster does not serve as an agent of the water users, but is a ministerial office. *Bailey v. Idaho Irrigation Co.*, 39 Idaho 354, 227 P. 1055 (1924).

*Id.* at 5; See also *Jones v. Big Lost River Irrigation District*, 93 Idaho 227, 459 P.2d 1009 (1969)

(The watermaster is not the agent of the water company or water user but is a ministerial officer.).

Under its authority delegated by the Director, watermasters are accorded the duty described in

Idaho Code § 42-607:

**It shall be the duty of said watermaster to distribute the waters of the public stream, streams or water supply**, comprising a water district, among the several ditches taking water therefrom according to the prior rights of each respectively, in whole or in part, and to shut and fasten, or cause to be shut or fastened, under the direction of the department of water resources, the headgates of the ditches or other facilities for diversion of water from such stream, streams or water supply, when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others in such stream or water supply[.]

Finally, IDWR has prepared a “Watermaster Handbook” describing the authority of the watermaster to curtail during times of scarcity, i.e., when priority administration is necessary:

The watermaster is authorized to close the headgate of a party who is not entitled to the use of water or who is not using the water in compliance with the terms of the water right. This authority is applicable only during times of scarcity and after the watermaster has been appointed by the director of the department. Where it is clear that a party is diverting when not entitled to divert (i.e.; after right has been cut), or where a party is diverting water without a right, the watermaster should immediately close the headgate.

*Watermaster Handbook* at 31 (available at <https://idwr.idaho.gov/files/districts/20130701-Watermaster-Handbook.pdf>). The Idaho Code even allows the watermaster to padlock diversions if necessary. *See* Idaho Code § 42-607 (watermaster can “shut and fasten” headgates in times of scarcity). Overall, these authorities are clear that it is IDWR and the water districts under IDWR’s supervision who have the statutory duty and obligation to administer, measure, account, and report water diversions.

There is no language in any of these authorities which allow for, permit, or even suggest that IDWR or Water District 74W can delegate the important responsibility of priority administration to any other private entity or individual. Accordingly, in the above-entitled matter, any concerns with the measurement, accounting, or reporting of matters associated with the 13 cfs bypass flow conditions should be addressed with the watermaster for Water District 74W, and not in the contested case for Bird’s 74-16187.

Further, relative to the Motion, any concerns with past measurement, accounting, or reporting of diversions under 74-15613 are not a basis to exclude findings and conclusions in the Motion that it is in the public interest to allow Whittakers to divert water during high flow periods for irrigation when sufficient water is flowing in Big Timber Creek to satisfy the passage requirement of adult anadromous fish, which is 13 cfs. Provided that the IWRB and IDFG agree with this, in the alternative to denying the Motion, Bird will stipulate to these findings and



conclusions provided that the IWRB and IDFG does not challenge the 13 cfs amount that was supported by the evidence presented in the Whittaker 74-15613 matter.

## II. CONCLUSION

For the reasons set forth above, the Motion must be denied as written. In the alternative, Bird will stipulate to the findings and conclusions described herein provided that the IWRB and IDFG does not challenge the 13 cfs amount that was supported by the evidence presented in the Whittaker 74-15613 matter.

DATED this 13<sup>th</sup> day of August, 2019.



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Robert L. Harris, Esq.  
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## CERTIFICATE OF SERVICE

I hereby certify that on this 13<sup>th</sup> day of August, 2019, I served a true and correct copy of the following described pleading or document on the attorneys and/or individuals listed below by the method(s) indicated.

**DOCUMENT SERVED: APPLICANT'S RESPONSE TO JOINT MOTION BY IWRB AND IDFG FOR PARTIAL SUMMARY JUDGMENT**

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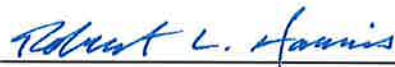
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